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No. 94-846

In The

Supreme Court of the United States

October Term, 1994

LEROY A. PETERSON AND ARDIS PETERSON,

Petitioners,

vs.

RICHARD ALLEN FISHER AND TRAILL COUNTY, A POLITICAL SUBDIVISION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

PAUL R. OPPEGARD
JEFFRIES, OLSON, FLOM, OPPEGARD & HOGAN
P. O. Box 9
Moorhead, MN 56561-0009
Telephone: (701) 280-2300
Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a merely negligent act can be a sufficient basis for asserting a violation of 42 U.S.C. § 1983 as it pertains to medical care claims of pretrial detainees.

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TO THE HONORABLE SUPREME COURT:

Respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's opinion affirming the District Court's decision in this case.

OPINIONS AND ORDERS BELOW

The opinion of the Eighth Circuit Court of Appeals is unpublished and cited at 29 F.3d 628. This opinion is reproduced in Petitioner's Appendix (hereinafter "Pet.

App.") at Pet. App. 1 to Pet. App. 3. The Eighth Circuit Court of Appeals' order denying Petitioners' petition for rehearing is unpublished but is reproduced at Pet. App. 4. The memorandum and order by the United States District Court for the District of North Dakota is unpublished but is reproduced at Pet. App. 5 to Pet. App. 22.

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

The Respondents agree with the Petitioners' presentation of constitutional provisions and statute pertinent to the petition for writ of certiorari. Additionally, Supreme Court Rule 10 is applicable to this matter, which states as follows:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> > (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as

to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this court.

.2. The same general considerations outlined above will control in respect to a petition for a writ of certiorari to review a judgment of the United States Court of Military Appeals.

SUP. CT. R. 10.

STATEMENT OF THE CASE

Petitioners have taken great liberty with their statement of the case in their petition for writ of certiorari by including misleading and immaterial facts. The actual material facts of this case have been concisely and accurately set forth in the memorandum and order by the district court. This unbiased summary of the material facts of this case, as set forth by the district court, are as follows:

On April 13, 1990, plaintiff Leroy A. Peterson ("Leroy") was brought to the Traill County

jail pursuant to a warrant of attachment for failure to pay child support. Leroy was then under the influence of alcohol and resisted arrest by Deputy Ray Weber. Following booking procedures, Leroy was placed in the county jail's detoxification cell. On Saturday, April 14, 1990, Leroy was placed in the general cell area. County jailers noticed nothing unusual in Leroy's behavior on Saturday, April 14.[1] At 2:15 p.m. on Sunday, April 15, 1990, Leroy placed a call to his home under the supervision of jailer Mike Chamberlain. At approximately 7:15 p.m. Sunday evening, inmate Chuck Syvertson reported to jailer Daryl Berg that Leroy was becoming disoriented.[2] Berg examined Leroy and satisfied himself that Leroy was aware of

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[1] Plaintiffs dispute the defendants' assertion, stating that Leroy was suffering from alcohol withdrawal symptoms and delirium tremens during the entire period of confinement, and that the defendants knew or should have known this fact, but simply failed to arrange necessary medical care.

[2] Factual disputes exist with regard to the actions of inmates who were housed at Traill County at the time of Leroy's arrest. As part of their "Statement of Material Facts Not In Dispute," defendants assert that, during the week prior to Leroy's incarceration, inmates at the jail had engaged in riot activities. Further, defendants contend that, due to a previous jail break and the inmates' riot activities of the inmates involved. The jailers were apparently instructed by Fisher to report all unusual activities of any inmate. Plaintiffs dispute the assertion that inmate Syvertson was involved in any of the riot activities and contend that Fisher's decision to delay medical treatment for Leroy was based neither on the riot activities nor the alleged jail break.

his surroundings and had his faculties about him. Nonetheless, Berg phoned Sheriff Richard Allan Fisher ("Fisher") at home to report Syvertson's statement and Berg's own opinion that no medical emergency existed. Fisher and Berg determined to keep a watchful eye on Leroy for the rest of the night.

Berg later performed cell checks at 7:30, 7:48, 8:00, 8:15, 8:40, 9:00, 9:15, 10:00, 10:15, 10:30, 11:00, and 11:30 p.m., and at 12:00 midnight,[3] noting nothing unusual in Leroy's behavior. Berg's shift ended at midnight, at which time jailer Mike Chamberlain started his shift with a midnight cell check. Chamberlain later performed cell checks at 1:00, 2:00, 2:20, 2:45, 3:10, 3:30, 4:00, 4:30, 5:00, 5:30, 6:00, 7:00, and 8:00 a.m. At the 2:20 a.m. cell check, Chamberlain noted that Leroy's hands were shaking after he requested a cigarette from Chamberlain. At this time, other prisoners had apparently reported that Leroy was disoriented, but Chamberlain's cell check did not confirm this. The 2:45 a.m. cell check revealed Leroy pacing and unable to sleep. Other inmates then reported to Chamberlain that Leroy was hallucinating. Again, Chamberlain's personal observations did not reveal this. At 3:30 a.m., inmates Syverston and Frank Harris reported that Leroy thought he was at home and was calling out for his wife; again these reports were not substantiated by Chamberlain during the cell check. Chamberlain then called Fisher at home to inform him of the

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[3] Plaintiffs note that references by defendants to cell checks at particular times are substantiated by the jail logs. However, the plaintiffs dispute some of defendants' contentions as to what occurred at those times.

> inmates' assertions regarding Leroy. Chamberlain opined that no medical emergency existed and he and Fisher agreed that Leroy should be watched closely and examined by a physician in the morning. Chamberlain performed cell checks every half hour until Leroy fell asleep between 5:00 and 5:30 a.m. Chamberlain then performed cell checks every hour until the end of his shift at 8:00 a.m. Monday, April 16, 1990.
>
> Jailer Nola Stenerson came on duty at 8:00 a.m. Monday, April 16, 1990. She phoned Hillsboro Hospital at 9:10 a.m. to set up an appointment for a physician to examine Leroy. She was informed that the physician was unavailable and that the hospital would call back at 9:30. At 9:25 a.m., Stenerson heard a loud noise and, with Chamberlain, proceeded to the cell area, where they found plaintiff lying on his back and bleeding from a head injury. An ambulance was summoned and Leroy was taken to Hillsboro and later transferred to a Fargo hospital.

[Pet. App. 6-8].

District Court Proceedings. Petitioners brought the present action against Respondents in the District Court for the District of North Dakota on June 1, 1992, alleging that under the facts of this case, Petitioner Leroy Peterson's rights were violated by Respondent Richard Allan Fisher (hereinafter "Respondent Fisher") in contravention of 42 U.S.C. § 1983; that the actions of Respondent Fisher were reckless, grossly negligent, willful or wanton, and; that Respondent Fisher and the staff members of the Traill County Jail were negligent in providing Petitioner Leroy Peterson with adequate medical care during his confinement.

Respondents made a motion for summary judgment on these claims. Upon hearing the motion for summary judgment, the district court dismissed Petitioners' § 1983 claim on the basis that Sheriff Fisher's actions fell short of the "deliberate indifference" standard utilized by the Eighth Circuit Court of Appeals and almost all other circuit courts. [Pet. App. 9-13]. The district court went on to note that Petitioners' § 1983 claim would fail even if the court were to utilize the standard previously set forth by the fifth circuit in the case of *Cupit v. Jones*, 835 F.2d 82 (5th Cir. 1987) that "pretrial detainees were entitled to 'reasonable medical care' unless the failure to supply it is reasonably related to a legitimate governmental objective". [Pet. App. 11-12]. *See Cupit v. Jones*, 835 F.2d 82, 85 (5th Cir. 1987).

Petitioners' state law claims against Respondent Fisher were also dismissed by summary judgment for the reason that no reasonable jury could find Respondent Fisher's acts or omissions to be reckless, grossly negligent, willful, or wanton. [Pet. App. 14-17]. However, the district court denied Respondent's motion for summary judgment against the state common-law negligence claims asserted against Traill County because there was a jury question as to whether the actions of Respondent Fisher or the Traill County jailers constituted negligent conduct which could be imputed to Traill County under the doctrine of respondeat superior. [Pet. App. 17-21].

Court of Appeals Proceedings. Upon appeal, the United States Court of Appeals for the Eighth Circuit affirmed the district court's judgment "for the reasons stated in the District Court's Memorandum and Order dated September 27, 1993." [Pet. App. 1-3]. This decision

by the Eighth Circuit Court of Appeals was *per curiam.* The court of appeals also noted that "summary judgment in this case is consistent with the Supreme Court's recent pronouncement" in *Farmer v. Brennan* that "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety." *Quoting Farmer v. Brennan,* 114 S. Ct. 1970, 1979 (1994). Petitioners requested a rehearing with suggestion for rehearing *en banc.* Petitioners' request for rehearing was summarily denied. [Pet. App. 4].

SUMMARY OF THE ARGUMENT

Upon review of all undisputed material facts, the district court and the court of appeals determined as a matter of law that Respondent Fisher's actions with regard to the treatment of pretrial detainee Leroy Peterson were not deliberately indifferent, reckless, grossly negligent, willful or wanton. The only unresolved question was whether such actions could be deemed to be negligent. This Court has determined on prior occasions that merely negligent acts are insufficient to cause a deprivation of due process rights under the fourteenth amendment.

Therefore, in light of the facts of this case, it is not necessary for this Court to determine at this time whether the standard for a § 1983 action involving medical care claims of pretrial detainees is that of "deliberate indifference," as defined in the recent Supreme Court case of

Farmer v. Brennan, or some lesser standard, which necessarily exceeds that of negligence.

Further, no other reasons exist which demonstrate that the court should exercise its judicial discretion and grant the petition for writ of certiorari.

REASONS WHY PETITION SHOULD BE DENIED

1. Proper resolution of this case does not require a determination by this Court as to the standard for a § 1983 claim asserted by a pretrial detainee.

Petitioners primary basis for requesting that this Court grant their petition for writ of certiorari is that the standard of "deliberate indifference" was utilized by the district court and the court of appeals in determining whether or not Petitioners had a valid § 1983 claim. It is Petitioners' contention that this standard only applies to convicted prisoners and not pretrial detainees such as Petitioner Leroy Peterson. Petitioners therefore are requesting that this Court grant their petition for writ of certiorari to define the standard to be utilized in a § 1983 action relative to medical care claims of pretrial detainees.

However, such determination by this Court is not necessary for the proper resolution of this case and therefore Petitioner's petition for writ of certiorari should be denied. *See Canton v. Harris*, 489 U.S. 378, 388 n.8 (1989) (Supreme Court did not need to determine the culpability requirement for "a denial of the due process right to medical care while in detention" because the case could

be resolved on other grounds). Pursuant to Rule 10 of the Superior Court Rules, review on writ of certiorari is purely a matter of discretion by this Court. *See* SUP. CT. R. 10. Only if there are "special and important reasons" will a petition for writ of certiorari be granted. *Id.* Because this case can be properly resolved without the need for this Court to enunciate the standard for medical care claims of pre-trial detainees, any discussion of such applicable standard would be academic in nature. Issues which are merely academic are not "special and important reasons" as set forth in Rule 10 of the Supreme Court Rules. *Rice v. Sioux City Memorial Park Cemetary*, 349 U.S. 70, 74 (1954). It was held by the district court that Respondent Fisher did not act deliberately indifferent, recklessly, grossly negligent, willfully or wantonly in his actions toward Petitioner Leroy Peterson as a pretrial detainee. The only unresolved question was whether Respondent Fisher or other county employees acted *negligently* in their treatment of him. Upon careful review, the court of appeals unanimously held that, based upon the undisputed material facts of the case, the district court properly granted Respondents' motion for summary judgment.

In effect, the district court and the court of appeals found that Respondent Fisher's actions or inaction towards Petitioner Leroy Peterson could, at *most*, be considered mere *common law negligence*. It is virtually unanimous among the circuit courts that mere negligence is not sufficient to satisfy a claim based upon an alleged violation of due process under the fourteenth amendment. *See Foulks v. Cole County*, 991 F. 2d 454, 457 (8th Cir. 1993); *Salazar v. Chicago*, 940 F. 2d 233, 238 (7th Cir. 1991); *Danese*

v. Asman, 875 F.2d 1239, 1243 (6th Cir. 1989); *Wisenant v. Yuam*, 739 F.2d 160, 163 n.4 (4th Cir. 1984); *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986); *Garcia v. Salt Lake County*, 768 F.2d 303, 307 (10th Cir. 1985); *Hamm v. DeKalb County*, 774 F.2d 1567, 1571-72 (11th Cir. 1985). These courts have essentially held that only intentional or criminally reckless conduct can violate the due process clause of the fourteenth amendment. *Id.* Such opinions are consistent with the rulings by this Court that merely negligent acts are not sufficient to cause a deprivation of due process. *See Daniels v. Williams*, 474 U.S. 327, 332-33 (1986); *Davidson v. Cannon*, 474 U.S. 344, 347 (1986).

The only circuit which could have *arguably* adopted a standard by which a deprivation of due process could be satisfied with a showing of mere negligence is in the fifth circuit. In the case of *Cupit v. Jones*, 835 F.2d 82 (5th Cir. 1987), the Fifth Circuit Court of Appeals held that a "reasonable medical care" standard applied in determining due process violations for pre-trial detainees. *Cupit v. Jones*, 835 F.2d 82, 85 (5th Cir. 1987). To the extent that the fifth circuit's "reasonableness" standard suggests a simple negligence standard, it clearly contravenes Supreme Court authority. In applying the *Cupit* standard, the fifth circuit has not attempted to reconcile it with the *Daniels v. Williams* and *Davidson v. Cannon* decisions. However, several more recent fifth circuit cases appear to have applied a culpability requirement greater than that of negligence. *See, e.g., Thomas v. Kippermann*, 846 F.2d 1009, 1011 (5th Cir. 1988) (allegation of deliberate denial of medical care implicating more than negligence); *Simpson v. Hines*, 903 F.2d 400, 403 (5th Cir. 1990) (record established at least a callous indifference to a known medical condition). In the

present case, the district court noted that even under the *Cupit v. Jones* standard, Petitioners' § 1983 claim would fail.

The undisputed material facts of this case clearly show that Respondent Fisher's actions or inaction towards Petitioner Leroy Peterson were, at most, negligent. Because negligence is not a sufficient basis for alleging a violation of due process under § 1983, Petitioners have no such cause of action against Respondent Fisher. Therefore, it is unnecessary for the Court to determine at this time whether the "deliberate indifference" standard, as defined in *Farmer v. Brennan*, 114 S.Ct. 1970 (1994), is applicable or whether some lessor standard (exceeding a negligence standard) applies when the claims of due process violations involve the medical care of pretrial detainees. Therefore, Petitioners' writ for certiorari should be denied.

2. The lower court's findings that Respondent Fisher's conduct did not constitute reckless, grossly negligent conduct, or willful or wanton misconduct was not based upon the "deliberate indifference" standard.

Petitioners assert in their petition for writ of certiorari that the district court and the court of appeals implicitly found that unless a "deliberate indifference" standard was met, the standards of recklessness, gross negligence, and willful and wanton misconduct could not be met. This is a completely inaccurate assertion.

The district court discussed in extensive detail why it found that there was a complete absence of recklessness,

gross negligence and willful and wanton misconduct by Respondent Fisher. There was no suggestion whatsoever that this particular holding depended upon the determination that Respondent did not act with deliberate indifference. The only correlation between these separate determinations was the factual analysis of Respondent Fisher's conduct. The court of appeals likewise reviewed the undisputed material facts and affirmed the granting of Respondent Fisher's motion for summary judgment based upon the reasons set forth in the memorandum and order by the district court.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Dated this 12th day of December, 1994.

Respectfully submitted,

JEFFRIES, OLSON, FLOM, OPPEGARD & HOGAN, P.A.

PAUL R. OPPEGARD 41134
P. O. Box 9
Moorhead, MN 56561-0009
Telephone: (701) 280-2300

Attorneys for Respondents